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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 OAKLAND DIVISION

14 CLAIRE DELACRUZ, individually, and on  
15 behalf of other members of the general public  
16 similarly situated,

17 Plaintiff,

18 v.

19 CYTOSPORT, INC., a California  
20 Corporation,

21 Defendant.  
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CASE NO.: 4:11-cv-03532-CW

**ORDER GRANTING FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT AND  
GRANTING APPLICATION FOR  
ATTORNEYS' FEES, COSTS AND  
INCENTIVE AWARDS; GRANTING  
OBJECTOR'S ADMINISTRATIVE MOTION  
(Docket Nos. 74, 81, 84)**

1 WHEREAS, following a hearing on Plaintiff's Motion for Preliminary Approval of Class  
2 Action Settlement, the parties made modifications to their original proposed settlement agreement  
3 and, thereafter, presented this Court with a proposed First Amended Settlement Agreement and  
4 Release in the above-captioned matter (the "Settlement Agreement and Release");

5 WHEREAS, by Order dated November 18, 2013, this Court granted preliminary approval (the  
6 "Preliminary Approval Order") of the Settlement Agreement and Release;

7 WHEREAS, in connection with preliminary approval of the parties' Settlement  
8 Agreement and Release, the Court provisionally certified a nationwide settlement class for  
9 settlement purposes only, approved the procedure for giving notice and forms of notice, and  
10 set a final fairness hearing on May 15, 2014;

11 WHEREAS, on May 15, 2014, the Court held the duly noticed final fairness hearing  
12 to consider: (1) whether the terms and conditions of the Settlement Agreement and Release  
13 are fair, reasonable and adequate, and any objections thereto; (2) whether a judgment should  
14 be entered dismissing the named Plaintiff Claire Delacruz's ("Plaintiff") complaint on the  
15 merits and with prejudice in favor of Defendant CytoSport, Inc. ("CytoSport") and against  
16 all persons or entities who are settlement class members; and (3) whether and in what  
17 amount to award attorney's fees and expenses to counsel for the settlement class;

18 WHEREAS, the Court has considered all written submissions of counsel, all  
19 objections timely filed, all record evidence and all oral argument and other matters  
20 submitted to it at the hearing and otherwise;

21 WHEREAS, the Court finds that the Settlement Agreement was the result of  
22 extensive and protracted arms-length negotiations occurring over several years and multiple  
23 mediation sessions with the Honorable Edward A. Panelli (Ret.) and the Honorable Carl J.  
24 West (Ret.), both currently affiliated with JAMS. Counsel for the parties are highly  
25 experienced in class action litigation, with full knowledge of the risks inherent in this  
26 Action. The extent of written discovery, depositions, document productions, and  
27 independent investigations by counsel for the parties, and the factual record compiled,  
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1 suffices to enable the parties to make an informed decision as to the fairness and adequacy  
2 of the settlement;

3 WHEREAS, the Court has determined that the proposed Settlement Agreement and  
4 Release, the significant relief provided to the Settlement Class Members—in the form of  
5 CytoSport’s agreement to make certain payments to settlement class members as well as its  
6 agreement to discontinue the use of certain words and phrases in the labeling and marketing  
7 of certain Muscle Milk® products—as described in the Settlement Agreement and Release,  
8 and the award of attorneys’ fees and expenses requested, are fair, reasonable and adequate;  
9 and

10 WHEREAS, the matter having been submitted, due and adequate notice having been  
11 provided to Class Members as required by the Court’s Preliminary Approval Order, and  
12 otherwise being fully informed, and good cause appearing, the Court hereby Orders as  
13 follows:

14 1. The Settlement Agreement and Release, and all attachments thereto, is  
15 expressly incorporated by reference into this Final Order and made a part hereof for all  
16 purposes. Except where otherwise noted, all capitalized terms used in this Final Order shall  
17 have the meanings set forth in the Settlement Agreement and Release.

18 2. The Court has personal jurisdiction over the Parties and all Settlement Class  
19 Members, and has subject-matter jurisdiction over this Action, including, without limitation,  
20 jurisdiction to approve the proposed settlement, to rule on all objections timely filed, to  
21 grant final certification of the Settlement Class, to settle and release all claims arising out of  
22 the transactions alleged in Plaintiff’s complaint in the Action, and to dismiss this Action on  
23 the merits and with prejudice.

24 3. The Court finds, for settlement purposes only and conditioned upon the entry  
25 of this Final Order and upon the occurrence of the Effective Date, that the requirements for  
26 a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have  
27 been satisfied in that: (a) the number of Settlement Class Members is so numerous that  
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1 joinder of all members thereof is impracticable; (b) there are questions of law and fact  
2 common to the Settlement Class; (c) the claims of the Plaintiff are typical of the claims of  
3 the Settlement Class they seek to represent for purposes of settlement; (d) the Plaintiff has  
4 fairly and adequately represented the interests of the Settlement Class and will continue to  
5 do so, and the Plaintiff has retained experienced counsel to represent her; (e) for purposes of  
6 settlement, the questions of law and fact common to the Settlement Class Members  
7 predominate over any questions affecting any individual Settlement Class Member; and (f)  
8 for purposes of settlement, a class action is superior to the other available methods for the  
9 fair and efficient adjudication of the controversy. *See Amchem Prods., Inc. v. Windsor*, 521  
10 U.S. 591, 613-14 (1997). The Court also concludes that, because this Action is being settled  
11 rather than litigated, the Court need not consider manageability issues that might be  
12 presented by the trial of a nationwide class action involving the issues in this case. *Id.* at  
13 620.

14         4. In making these findings, the Court has considered, among other factors: (i)  
15 the interests of Settlement Class Members in individually controlling the prosecution or  
16 defense of separate actions; (ii) the impracticability or inefficiency of prosecuting or  
17 defending separate actions; (iii) the extent and nature of any litigation concerning these  
18 claims already commenced; and (iv) the desirability of concentrating the litigation of the  
19 claims in a particular forum. The Court takes guidance in its consideration of certification  
20 and settlement issues from *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

21         5. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby  
22 finally certifies this Action for settlement purposes as a nationwide class action on behalf of:  
23 a class of all persons who purchased one or more Muscle Milk® Ready-to-Drink beverages  
24 (the “RTD”) and/or Muscle Milk® bars (the “Bar”) (the Bar together with the RTD, the  
25 “Products”) at retail in the United States from July 18, 2007 through December 31, 2012  
26 (the “Settlement Class”). As defined in the Settlement Agreement and Release, “Settlement  
27 Class Member(s)” means any member of the Settlement Class who does not elect exclusion  
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1 or opt out from the Settlement Class pursuant to the terms and conditions for exclusion set  
2 out in the Settlement Agreement and Release and the Long Form Notice. Excluded from  
3 the Settlement Class are all persons who are employees, directors, officers, and/or agents of  
4 CytoSport or its subsidiaries and affiliated companies, as well as the Court and its  
5 immediate family and staff.

6           6.       The Court appoints the law firm of Baron & Budd, P.C. as counsel for the  
7 Class (“Class Counsel”). The Court designates named Plaintiff Claire Delacruz as the  
8 representative of the Settlement Class. The Court finds that the named Plaintiff and Class  
9 Counsel have fully and adequately represented the Settlement Class for purposes of entering  
10 into and implementing the Settlement Agreement and Release and have satisfied the  
11 requirements of Rule 23(a)(4) of the Federal Rules of Civil Procedure.

12           7.       The Court finds that the electronic and publication notice are in accordance  
13 with the terms of the Settlement Agreement and Release and this Court’s Preliminary  
14 Approval Order, and as explained in the declarations filed before the Final Fairness  
15 Hearing:

16                   (a)       constituted the best practicable notice to Settlement Class Members  
17 under the circumstances of this Action;

18                   (b)       were reasonably calculated, under the circumstances, to apprise  
19 Settlement Class Members of (i) the pendency of the Action, (ii) their right to exclude  
20 themselves from the Settlement Class and the proposed settlement, (iii) their right to object  
21 to any aspect of the proposed settlement (including final certification of the Settlement  
22 Class, the fairness, reasonableness or adequacy of the proposed settlement, the adequacy of  
23 the Settlement Class’s representation by Plaintiff or Class Counsel, and/or the award of  
24 attorneys’ and representative fees), (iv) their right to appear at the Final Fairness Hearing  
25 (either on their own or through counsel hired at their own expense), and (v) the binding  
26 effect of the orders and Final Order in this Action, whether favorable or unfavorable, on all  
27 persons and entities who do not request exclusion from the Settlement Class;  
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1 (c) constituted reasonable, due, adequate, and sufficient notice to all  
2 persons and entities entitled to be provided with notice; and

3 (d) fully satisfied the requirements of the Federal Rules of Civil Procedure,  
4 including Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure, the United States  
5 Constitution (including the Due Process Clause), the Rules of this Court, California's  
6 Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*), and any other applicable  
7 law.

8 8. The Court finds that CytoSport provided notice of the proposed settlement to  
9 the appropriate state and federal government officials pursuant to 28 U.S.C. § 1715.  
10 Furthermore, the Court has given the appropriate state and federal government officials the  
11 requisite ninety (90) day time period (pursuant to 28 U.S.C. § 1715) to comment or object to  
12 the proposed settlement before entering its Final Order and no such objections or comments  
13 were received.

14 9. The terms and provisions of the Settlement Agreement and Release, including  
15 any and all amendments and exhibits, have been entered into in good faith and are hereby  
16 fully and finally approved as fair, reasonable and adequate as to, and in the best interests of,  
17 the Plaintiffs and the Settlement Class Members, and in full compliance with all applicable  
18 requirements of the Federal Rules of Civil Procedure, the United States Constitution  
19 (including the Due Process Clause), and any other applicable law. The Court finds that the  
20 Settlement Agreement and Release is fair, adequate and reasonable based on the following  
21 factors, among other things:

22 (a) There is no fraud or collusion underlying this settlement, and it was  
23 reached after good faith, arms-length negotiations, warranting a presumption in favor of  
24 approval. *Officers for Justice v. Civil Serv. Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982).

25 (b) The complexity, expense and likely duration of the litigation favor  
26 settlement on behalf of the Settlement Class, which provides meaningful benefits on a much  
27 shorter time frame than otherwise possible. Based on the stage of the proceedings and the  
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1 amount of investigation and informal discovery completed, the Parties have developed a  
2 sufficient factual record to evaluate their chances of success at trial and the proposed  
3 settlement.

4 (c) The support of Class Counsel, who are highly skilled in class action  
5 litigation such as this, and the Plaintiff, who has participated in this litigation and evaluated  
6 the proposed settlement, also favors final approval. *See Boyd v. Bechtel Corp.*, 485 F. Supp.  
7 610, 622 (N.D. Cal. 1979); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir.  
8 1992).

9 (d) The settlement provides meaningful relief to the Settlement Class,  
10 including the injunctive and monetary relief described below, and falls within the range of  
11 possible recoveries by the Settlement Class.

12 10. As described in the Settlement Agreement and Release, CytoSport has agreed  
13 to distribute the total sum of \$1,000,000 to eligible Settlement Class Members, and, not later  
14 than forty-five (45) days following the Effective Date, to provide for the following  
15 injunctive relief:

- 16 (a) To cease using the words “Healthy, Sustained Energy” on the Principal  
17 Display Panel of all newly-printed packaging of Muscle Milk® RTD and  
18 Bars.
- 19 (b) To cease using the words “Healthy Fats” on any newly-printed packaging of  
20 Muscle Milk® RTD, provided however, that CytoSport may use the term  
21 “Healthy Fats” on the packaging of Muscle Milk® RTD (or related products)  
22 so long as such product contains fewer than 0.5 grams of saturated fat per  
23 serving, or CytoSport also includes the words “See nutrition information for  
24 saturated fat content” in connection with the words “Healthy Fats.”

25 11. Cytosport shall abide by the requirements of paragraph 10 above for three (3)  
26 years after the Effective Date. Nothing in this Final Order shall prevent CytoSport from  
27 implementing changes prior to the Effective Date. This Final Order does not preclude  
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1 CytoSport from making further changes to any of its product labels or marketing: (i) that  
2 CytoSport reasonably believes are necessary to comply with any statute, regulation, or other  
3 law of any kind; (ii) that are necessitated by product changes and/or to ensure that  
4 CytoSport provides accurate product descriptions; or (iii) that are more detailed than those  
5 required by the Settlement Agreement and Release and/or this Final Order.

6         12. The Court has reviewed the Proposed Product Distribution Plan for the  
7 distribution of residual settlement funds that was submitted by CytoSport (Dkt. 83 at p. 6-  
8 10) (the “Distribution Plan”). The Court approves the Distribution plan and the contents of  
9 the Distribution Plan are incorporated as if set forth fully herein. The Court finds that the  
10 terms and conditions of the Distribution Plan and the portions of the Settlement Agreement  
11 and Release relating to product distribution (Dkt. 67-1 at p. 12-13) comply with the legal  
12 standards governing such distributions. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir.  
13 2012), *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011), and *Six Mexican Workers v.*  
14 *Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990). Based on the Court’s review of  
15 these materials and all of the evidence before the Court, the Court makes the following  
16 findings: (1) the Court finds that the Distribution Plan includes multiple features to facilitate  
17 distribution of products to members of the Settlement Class; (2) the Court finds that the  
18 Distribution Plan is carefully focused on and tailored to Plaintiff’s allegations and the  
19 objectives of the underlying statutes; (3) the Court finds that the Distribution Plan ensures  
20 that reasonable efforts will be made to target class members; (4) the Court finds that the  
21 Distribution Plan does not diminish the cash payments made to class members; and (5) the  
22 Court finds that the product distributions were not made in lieu of cash payments to the  
23 class. Finally, the Settlement Agreement provides that the value of any products distributed  
24 shall be measured according to their retail value, the distribution shall occur over a three-  
25 year period, the products distributed shall be in addition to any other charitable donations  
26 planned by Cytosport, and Cytosport shall not seek a tax deduction for such product  
27 donations.  
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1           13. In recognition of Plaintiff's efforts on behalf of the Settlement Class, as set  
2 forth in the Declaration of Claire Delacruz in Support of Motion for Final Approval of Class  
3 Action Settlement, the Court approves Plaintiff's request for an incentive award of \$5,000,  
4 and finds such award just and reasonable. Cytosport shall pay such award in accordance  
5 with the terms of the Settlement Agreement and Release. In approving the incentive award,  
6 the Court has considered Plaintiff's commitment of time to the Action which spanned  
7 almost three years, the risk of liability for Cytosport's costs, the benefits provided to tens of  
8 thousands of class members and the absence of any conflicts of interest between Plaintiff  
9 and members of the Settlement Class.

10           14. Class Counsel seek recovery of \$855,157.25 in attorneys' fees and \$190,839.41 in  
11 expenses. This Court is familiar with the work performed by Class Counsel in this matter.  
12 The Court finds that the expenses incurred, work performed, time spent, and rates charged by  
13 Class Counsel appear to be reasonable. The requested fee and expense award is authorized  
14 and appropriate under the Consumer Legal Remedies Act ("CLRA"), California Civil Code  
15 Section 1780(e), and the Private Attorney General Statute, California Civil Procedure Section  
16 1021.5. The settlement discussed herein, which resulted in the enforcement of an important  
17 right affecting the public interest, is favorable for the Settlement Class, and constitutes a  
18 victory for Settlement Class Members. Additionally, Class Counsel advanced the public  
19 interest by enforcing consumer protection laws, and obtained significant benefits for more  
20 than 33,300 members of the Settlement Class. Accordingly, this Court applies the lodestar  
21 method to award fees under the CLRA and Private Attorney General Statute.

22           15. To assist the Court in evaluating the reasonableness of the time spent on this case, Class  
23 Counsel presented a detailed declaration which included a schedule of time records and expenses  
24 incurred, and the experience and qualifications of the attorneys who worked on this case. Such  
25 declaration reflects that Class Counsel has devoted a total of 1,453.35 hours to the  
26 investigation and litigation of this case and the hourly rates for the lawyers who performed  
27 such services ranged from \$390 to \$825 per hour for attorneys, depending on their experience  
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1 and skill, and \$95 per hour for paralegal staff. Class Counsel has computed a total lodestar of  
2 \$855,157.25 through February 25, 2014. After considering Class Counsel's statements and  
3 legal authorities concerning the market rates for plaintiffs' class action attorneys, and the  
4 Court's own experience with hourly rates in this District, the Court is satisfied that Class  
5 Counsel's fees meet the reasonableness standard. *See Staton v. Boeing Co.*, 327 F.3d 938,972  
6 (9th Cir. 2003).

7  
8 16. In evaluating Class Counsel's lodestar, the Court has also considered whether Class  
9 Counsel used reasonable hourly rates and sound billing practices and assessed the requested lodestar in  
10 light of the results obtained for the class. *See Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942  
11 (9th Cir. 2011). Additionally, in considering the reasonableness of attorneys' fees, the Court has  
12 considered the time and labor required, novelty and complexity of the litigation, skill and experience of  
13 counsel, the results obtained, and awards in similar cases. *See Blum v. Stenson*, 465 U.S. 886, 898-900  
14 (1984); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

15 17. Class Counsel have done a considerable amount of work to develop Plaintiff's claims in  
16 this case, and have committed significant resources to this matter. This action conferred a significant  
17 benefit on a large class of persons by (1) making guaranteed financial relief available to over 30,300  
18 claimants who individually could not be expected to dedicate the financial resources required to litigate  
19 the claims asserted in this case, (2) distributing residual settlement funds in the form of re-labeled  
20 Muscle Milk Light products, or other products with a similar nutrient profile, targeted to members of  
21 the Settlement Class pursuant to Cytosport's Proposed Product Distribution Plan, and (3) obtaining the  
22 injunctive relief discussed in paragraph 10 above.

23 18. This case also presented unique complexities concerning the interplay between the FDA  
24 guidelines and the false advertising laws. These issues were contested at the pleading stage, including  
25 two motions to dismiss which disposed of certain of Plaintiff's claims, and Class Counsel retained  
26 experts in connection with anticipated class certification motions to opine on key issues including  
27 whether the subject products were "healthy," and whether the subject representations were material to  
28 consumers. Additionally, Class Counsel has submitted a declaration attesting to the significant

1 expenditure of Class Counsel's time on matters such as: (1) extensive pre-litigation investigation; (2)  
2 consulting with industry experts; (3) extensive and detailed legal research into the substantive law of  
3 the causes of action at issue; (4) developing and executing litigation strategies; (5) researching and  
4 preparing for class certification; (6) developing and executing mediation and settlement strategies; and  
5 (7) analyzing data and information exchanged between the parties to assure informed decision-making  
6 concerning the risks, expenses, and benefits of continuing to litigate the case.

7  
8 19. Class Counsel undertook significant financial risk in prosecuting this case. Class  
9 Counsel undertook this matter solely on a contingent basis with no guarantee of recovery. Class  
10 Counsel risked their resources to prosecute this action. There was no assurance that this case would  
11 have been certified, that certification would include a nationwide class, or that Plaintiff would have  
12 succeeded at trial.

13 20. Class Counsel vigorously and competently pursued the Class Members' claims. The  
14 arm's-length settlement negotiations that took place demonstrate that Class Counsel adequately  
15 represented the Class. Moreover, the Court finds no evidence that Plaintiff and Class Counsel had  
16 any conflicts of interests with the Class. Rather, Plaintiff, like each absent Class Member, had a  
17 strong interest in proving CytoSport's common course of conduct, establishing its unlawfulness and  
18 obtaining redress.

19 21. Class Counsel also provided the Court with a declaration attesting to their extensive  
20 experience and expertise in prosecuting complex class actions. Class Counsel are active class action  
21 practitioners who are experienced in consumer fraud litigation. Their work was performed by a core  
22 team of attorneys fully familiar with the complex factual and legal issues presented by this litigation.

23 22. The Court has also cross-checked Class Counsel's lodestar fee against the percentage-  
24 of-the-recovery method. *See Bluetooth, supra*, at 943. To that end, when determining the value of  
25 the settlement, courts often consider the non-monetary benefits conferred, as well as any cash  
26 attorneys' fee and cost payments to be made pursuant to the settlement terms with the defendants.  
27 *See, e.g. Staton v. Boeing Co.*, 327 F.3d 938, 972-74 (9th Cir. 2003). The Ninth Circuit also  
28 identified five factors that are relevant in determining whether requested attorneys' fees in a common

1 fund case are reasonable: (1) the results achieved; (2) the risk of litigation; (3) the skill required and  
2 the quality of work; (4) awards made in similar cases; and (5) the contingent nature of the fee and the  
3 financial burden carried by the plaintiffs. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th  
4 Cir. 2002). Applying these factors, the Court finds that the requested fees are reasonable

5       23. Class Counsel achieved a settlement in this action that altered Cytosport's business  
6 practices and provided guaranteed compensation to Class members for alleged misrepresentations.  
7 The monetary relief component of the Amended Settlement provides a guaranteed, fixed monetary  
8 claim fund of \$1,000,000 for payment of claims, with claimants paid at \$30.00 each, and the residual,  
9 if any, to be paid to Class Members who made claims on a *pro rata* basis, up to a total of \$60.00 for  
10 each claimant. No proof of purchase is necessary for class members to qualify for monetary relief,  
11 and class members may submit claim forms online, in addition to the use of other methods of  
12 delivery (including mail).

13       24. Although the Parties have agreed in the Settlement Agreement that the monetary value  
14 of CytoSport's relabeling obligation is \$1,000,000, for the purpose of calculating attorneys' fees  
15 based on the common fund approach, Class Counsel did not attribute any monetary value to such  
16 injunctive relief. Nevertheless, the Court finds that the injunctive relief provided for in the  
17 Settlement Agreement, and the notice of such relief provided to Class Members, does constitute a  
18 valuable benefit to be considered in determining the reasonableness of Class Counsel's fees. Thus,  
19 Class Counsel's requested fee award is within the Ninth Circuit's "benchmark," even without  
20 attributing any monetary value to CytoSport's agreement to re-label the Products.

21       25. Thus, the resolution of this case through settlement provides the Settlement Class with  
22 the benefit of significant financial recovery without the delay of continued litigation.

23       26. For the foregoing reasons, the Court approves Class Counsel's fees in the sum  
24 of \$855,157.25 and costs in the sum of \$190,839.41. Cytosport shall pay such sums in  
25 accordance with the Settlement Agreement.

26       27. The Court has evaluated and overrules the objections filed by Theodore Frank,  
27 William Chamberlain, Don Orrell and Craig Smotzer. In ruling on such objections, the Court  
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1 has evaluated the factors set forth in *Bluetooth, supra*, and finds that the settlement was  
2 reached only after contested litigation, including through motion practice, written discovery,  
3 depositions, three mediations and months of settlement negotiations. The terms and structure of the  
4 Settlement Agreement were the subject of intense, serious, arms-length negotiations, with the  
5 assistance of two respected retired judges, and was not the subject of self-dealing or collusion.  
6 In that regard, the Settlement Agreement does not provide Class Counsel with a  
7 disproportionate distribution of the settlement and Settlement Class Members will receive a  
8 guaranteed monetary distribution of \$1 million. The Settlement Agreement also does not contain  
9 any “kicker” arrangement whereby any reduction in attorneys’ fees reverts to Cytosport. To  
10 date, over 33,300 class members have applied to receive more than \$30.00 each and notice of the  
11 settlement has been disseminated to fifty-five federal and state government officials, none of whom  
12 have filed objections. The reaction of class members to the settlement has been overwhelmingly  
13 positive, and is a significant factor to be weighed in considering its adequacy. *See Hanlon v.*  
14 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

15         28. The parties are directed to consummate the Settlement Agreement and Release  
16 in accordance with its terms and conditions. The Court hereby declares that the Settlement  
17 Agreement and Release is binding on all parties and Settlement Class Members, and it is to  
18 be preclusive in all pending and future lawsuits or other proceedings.

19         29. Upon the Effective Date, the Releasing Parties (as that term is defined in the  
20 Settlement Agreement and Release) shall be deemed to have, and by operation of the Final  
21 Order and Judgment shall have, fully, finally and forever released, relinquished, and  
22 discharged all Released Claims against the Released Parties. Released Claims means and  
23 includes any and all claims, demands, rights, damages, obligations, suits, debts, liens, and  
24 causes of action of every nature and description whatsoever, ascertained or unascertained,  
25 suspected or unsuspected, existing or claimed to exist, including unknown claims (as  
26 described in Paragraph 31 below) as of the Effective Date by Plaintiff and all Settlement  
27 Class Members (and Plaintiff’s and Settlement Class Members’ respective heirs, executors,  
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1 administrators, representatives, agents, attorneys, partners, successors, predecessors-in-  
2 interest, and assigns) that:

3 (i) were brought or that could have been brought against the Released  
4 Parties, or any of them, and that arise out of or are related in any way to any or all of the  
5 acts, omissions, facts, matters, transactions, or occurrences that were or could have been  
6 directly or indirectly alleged or referred to in the Action (including, but not limited to  
7 alleged violations of state consumer protection, unfair competition, and/or false or deceptive  
8 advertising statutes (including, but not limited to, Cal. Bus. & Prof. Code § 17200 *et seq.*,  
9 Cal. Bus. & Prof. Code § 17500 *et seq.*, and Cal. Civ. Code § 1750 *et seq.*); breach of  
10 contract; breach of express or implied warranty; fraud; unjust enrichment, restitution,  
11 trespass, conversion, declaratory or injunctive relief, and other equitable claims or claims  
12 sounding in contract and tort); and

13 (ii) relate in any way to any claim, advertisement, representation, assertion,  
14 promise, or similar statement made by any of the Released Parties in any forum or medium  
15 whatsoever about, concerning, regarding, portraying, and/or relating to the healthfulness or  
16 nutritional attributes of the Products, including but not limited to all claims that relate in any  
17 way to: the use of the words “Healthy Sustained Energy” and/or “Sustained Energy” with  
18 respect to the Products; the use of the words “Healthy Fats” with respect to the Products; the  
19 use of the words “Good Carbohydrates” with respect to the Products; the calories provided  
20 by the Products; the ingredients in the Products, including but not limited to the amounts  
21 and/or presence of: (a) fractionated palm kernel oil, partially hydrogenated palm oil, or any  
22 variant thereof, (b) *trans* fat, (c) sugars of any type, or (d) artificial sweeteners of any type;  
23 the amount and/or presence of fat or saturated fat in the Products; the amount and/or  
24 presence of cholesterol in the Products; the amount and/or presence of carbohydrates in the  
25 Products; the amount and/or presence of protein in the Products; the marketing of the  
26 Products as “premium,” “healthy,” part of a “healthy lifestyle,” as a “healthy alternative  
27 beverage” and/or related statements; guidelines concerning when and/or in what quantities  
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1 to use the Products; and compliance with any federal, state, or local labeling requirements  
2 with respect to the healthfulness, nutritional content, and/or the nutritional attributes of the  
3 Products. However, Released Claims do not include claims for personal injury.

4         30. The Released Claims include known and unknown claims relating to the Action,  
5 and the Settlement Agreement and Release is expressly intended to cover and include all such  
6 injuries or damages, including all rights of action thereunder. Settlement Class Members have  
7 expressly, knowingly, and voluntarily waived the provisions of Section 1542 of the California  
8 Civil Code, which provides as follows:

9                 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
10                 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
11                 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN  
12                 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER  
13                 SETTLEMENT WITH THE DEBTOR.

14 Settlement Class Members have expressly waived and relinquished any and all rights and  
15 benefits that they may have under, or that may be conferred upon them by, the provisions of  
16 Section 1542 of the California Civil Code, or any other law of any state or territory that is  
17 similar, comparable, or equivalent to Section 1542, to the fullest extent that they may lawfully  
18 waive such rights or benefits pertaining to the Released Claims. In connection with such waiver  
19 and relinquishment, the Settlement Class Members have acknowledged that they are aware that  
20 they or their attorneys may hereafter discover claims or facts in addition to or different from  
21 those that they now know or believe exist with respect to Released Claims, but that it is their  
22 intention to hereby fully, finally, and forever settle and release all of the Released Claims known  
23 or unknown, suspected or unsuspected, that they have against the Released Parties. In  
24 furtherance of such intention, the release herein given by the Settlement Class Members to the  
25 Released Parties shall be and remain in effect as a full and complete general release  
26 notwithstanding the discovery or existence of any such additional different claims or facts.  
27 Each of the Parties expressly acknowledged that it has been advised by its attorney of the  
28 contents and effect of Section 1542, and with knowledge, each of the Parties has expressly  
waived whatever benefits it may have had pursuant to such section. Settlement Class

1 Members are not releasing any claims for personal injury. Plaintiff has acknowledged, and  
2 the Settlement Class Members shall be deemed by operation of the Final Order and  
3 Judgment to have acknowledged, that the foregoing waiver was separately bargained for and  
4 a material element of the settlement of which this release is a part.

5 31. Members of the Settlement Class who have opted out of or sought exclusion  
6 from the settlement by the date set by the Court do not release their claims and will not  
7 obtain any benefits of the settlement. The following individuals sought exclusion from the  
8 settlement class: Grace Agustin, John Andre, Junar M. Barcena, Rochelle Barker, Rowel  
9 Bellezo, Dave Booker, Timothy Falloni, Anthony Ford, Jim Haack, Adam Harper, Chris  
10 Konieczny, Nicholas Kostakis, Matt Lahr, Nikos Markellos, Carly Nichols, Jay Puyot, Kyle  
11 Robertson, Sean Root, John Sampiere, and Elpedio Solon.

12 32. The Court orders that, upon the Effective Date, the Settlement Agreement and  
13 Release shall be the exclusive remedy for any and all Released Claims of Settlement Class  
14 Members. The Court thus hereby permanently bars and enjoins Plaintiff, all Settlement  
15 Class Members, and all persons acting on behalf of, or in concert or participation with such  
16 Plaintiff or Settlement Class Members (including but not limited to the Releasing Parties),  
17 from: (a) filing, commencing, asserting, prosecuting, maintaining, pursuing, continuing,  
18 intervening in, or participating in, or receiving any benefits from, any lawsuit, arbitration, or  
19 administrative, regulatory or other proceeding or order in any jurisdiction based upon or  
20 asserting any of the Released Claims; (b) bringing a class action on behalf of Plaintiff or  
21 Settlement Class Members, seeking to certify a class that includes Plaintiff or Settlement  
22 Class Members, or continuing to prosecute or participate in any previously filed and/or  
23 certified class action, in any lawsuit based upon or asserting any of the Released Claims.

24 33. Neither the Settlement Agreement and Release, nor any of its terms and  
25 provisions, nor any of the negotiations or proceedings connected with it, nor any of the  
26 documents or statements referred to therein, nor any of the documents or statements  
27 generated or received pursuant to the claims administration process, shall be:  
28



1 (a) offered by any person or received against CytoSport as evidence or  
2 construed as or deemed to be evidence of any presumption, concession, or admission by  
3 CytoSport of the truth of the facts alleged by the Plaintiff or any Settlement Class Member  
4 or the validity of any claim that has been or could have been asserted in the Action or in any  
5 litigation, or other judicial or administrative proceeding, or the deficiency of any defense  
6 that has been or could have been asserted in the Action or in any litigation, or of any  
7 liability, negligence, fault or wrongdoing of CytoSport;

8 (b) offered by any person or received against CytoSport as evidence of a  
9 presumption, concession or admission of any fault, misrepresentation or omission with  
10 respect to any statement or written document approved or made by CytoSport or any other  
11 wrongdoing by CytoSport;

12 (c) offered by any person or received against CytoSport or as evidence of a  
13 presumption, concession, or admission with respect to any default, liability, negligence,  
14 fault, or wrongdoing, or in any way interpreted, construed, deemed, invoked, offered,  
15 received in evidence, or referred to for any other reason against any of the settling parties, in  
16 any civil, criminal, or administrative action or proceeding; provided, however, that nothing  
17 contained in this paragraph shall prevent the Settlement Agreement and Release (or any  
18 agreement or order relating thereto) from being used, offered, or received in evidence in any  
19 proceeding to approve, enforce, or otherwise effectuate the settlement (or any agreement or  
20 order relating thereto) or the Final Order and Judgment, or in which the reasonableness,  
21 fairness, or good faith of the parties in participating in the settlement (or any agreement or  
22 order relating thereto) is an issue, or to enforce or effectuate provisions of the settlement, the  
23 Final Order and Judgment, or the Claim Form as to CytoSport, Plaintiff, or the Settlement  
24 Class Members; or

25 (d) offered by any person or received against the Plaintiff or any other class  
26 representative as evidence or construed as or deemed to be evidence that any of their claims.  
27 Notwithstanding the foregoing, CytoSport may file the Settlement Agreement and Release,  
28

1 this Final Order, and/or any of the documents or statements referred to therein in support of  
2 any defense or claim that is binding on and shall have *res judicator, collateral estoppel*,  
3 and/or preclusive effect in all pending and future lawsuits or other proceedings maintained  
4 by or on behalf of Plaintiff and/or any other Settlement Class Members, and each of them,  
5 as well as their heirs, executors, administrators, successors, assigns, and/or any other of the  
6 Releasing Parties.

7 34. The Court has jurisdiction to enter this Final Order. Without in any way  
8 affecting the finality of this Final Order, this Court expressly retains exclusive and  
9 continuing jurisdiction over the Parties, including the Settlement Class, and all matters  
10 relating to the administration, consummation, validity, enforcement and interpretation of the  
11 Settlement Agreement and Release and of this Final Order, including, without limitation, for  
12 the purpose of:

13 (a) enforcing the terms and conditions of the Settlement Agreement and  
14 Release and resolving any disputes, claims or causes of action that, in whole or in part, are  
15 related to or arise out of the Settlement Agreement and Release, and/or this Final Order  
16 (including, without limitation: whether a person or entity is or is not a Settlement Class  
17 Member; whether claims or causes of action allegedly related to this Action are or are not  
18 barred or released by this Final Order; and whether persons or entities are enjoined from  
19 pursuing any claims against CytoSport);

20 (b) entering such additional orders, if any, as may be necessary or  
21 appropriate to protect or effectuate this Final Order and the Settlement Agreement and  
22 Release (including, without limitation, orders enjoining persons or entities from pursuing  
23 any claims against CytoSport), or to ensure the fair and orderly administration of the  
24 settlement; and

25 (c) entering any other necessary or appropriate orders to protect and  
26 effectuate this Court's retention of continuing jurisdiction over the Settlement Agreement  
27 and Release, the settling Parties, and the Settlement Class Members.  
28

35. Without further order of the Court, the settling Parties may agree to reasonably necessary extensions of time to carry out any of the provisions of the Settlement Agreement and Release.

36. This Action is hereby dismissed with prejudice and without costs as against CytoSport and the Released Parties.

37. In the event that the Effective Date does not occur, certification shall be automatically vacated and this Final Order, and all other orders entered and releases delivered in connection herewith, shall be vacated and shall become null and void.

38. Objector Theodore Frank's administrative motion to file a supplemental declaration is GRANTED. The Court has reviewed the supplemental declaration and considered it along with Mr. Frank's other submissions.

39. Judgment will enter separately.

IT IS SO ORDERED, this 1st day of July, 2014.

  
THE HONORABLE CLAUDIA WILKEN  
UNITED STATES DISTRICT COURT JUDGE